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 Entertainment, Inc., Remote Control  
 Productions, Inc., and Sony Music  
 Entertainment

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

RICHARD FRIEDMAN, an individual,  
  
 Plaintiff,

v.

HANS ZIMMER, individually, and  
 doing business as Remote Control  
 Songs; TWENTIETH CENTURY FOX  
 FILM CORPORATION; FOX  
 SEARCHLIGHT PICTURES, INC.;  
 FOX ENTERTAINMENT GROUP,  
 INC.; NEW REGENCY  
 PRODUCTIONS, INC.; MONARCHY  
 ENTERPRISES, S.A.R.L., individually,  
 and doing business as REGENCY  
 ENTERPRISES; RIVER ROAD  
 ENTERTAINMENT, LLC; PLAN B  
 ENTERTAINMENT, INC.; REMOTE  
 CONTROL PRODUCTIONS, INC.;  
 SONY MUSIC ENTERTAINMENT;  
 DOES ONE through TEN, inclusive,

Defendants.

Case No. 2:15-CV-00502 GHK (Ex)

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
AMENDED MOTION TO DISMISS  
 FIRST, THIRD, FOURTH, AND  
 FIFTH CLAIMS FOR RELIEF IN  
 FIRST AMENDED COMPLAINT;  
 DECLARATION OF ROBERT N.  
 KLIEGER**

Judge: Hon. George H. King  
 Date: May 18, 2015  
 Time: 9:30 a.m.  
 Crtrm.: 650

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1 **I. INTRODUCTION**

2 Plaintiff Richard Friedman (“Plaintiff”) claims that the musical score for the  
3 motion picture *12 Years a Slave* (the “Film” or “12YAS”) infringes the copyright in  
4 his musical composition entitled *To Our Fallen* (the “Composition”). Plaintiff has  
5 named as defendants ten individuals and entities allegedly involved in various  
6 aspects of the financing, production, and distribution of the Film and its soundtrack  
7 album. In addition, Plaintiff has sued the legal owner of the Composition—Imagem  
8 Production Music LLC (“Imagem”), to which Plaintiff transferred his copyright  
9 interest—alleging that Imagem violated duties owed to Plaintiff when it concluded  
10 there had been no infringement and refused to join as a plaintiff in this action. This  
11 motion to dismiss is filed on behalf of Defendants Hans Zimmer, individually and  
12 doing business as Remote Control Songs, Twentieth Century Fox Film Corporation,  
13 Fox Searchlight Pictures, Inc., Fox Entertainment Group, Inc., New Regency  
14 Productions, Inc., River Road Entertainment, LLC, Plan B Entertainment, Inc.,  
15 Remote Control Productions, Inc., and Sony Music Entertainment (hereafter,  
16 “Defendants”).

17 Plaintiff’s first claim for relief, for alleged copyright infringement under the  
18 U.S. Copyright Act, fails to identify each Defendant’s allegedly infringing activities.  
19 Instead, Plaintiff lumps together all ten Defendants and generically alleges that they  
20 “produced and distributed the [Film] in the United States and throughout the world.”  
21 FAC ¶ 23. Because neither involvement in the production of the Film nor  
22 distribution of the Film outside the United States is actionable under the Copyright  
23 Act, Plaintiff’s shotgun pleading fails to satisfy Rule 8 of the Federal Rules of Civil  
24 Procedure.

25 Plaintiff’s third claim for relief, for alleged violation of section 43(a) of the  
26 Lanham Act, is based on allegedly false representations, in advertisements and  
27 promotional materials for the Film, that the Film’s score was composed by Hans  
28 Zimmer rather than Plaintiff. This false authorship claim is foreclosed by the

1 Supreme Court’s holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539  
2 U.S. 23 (2003).

3 Finally, Plaintiff fails to state viable fourth and fifth claims for relief, for  
4 alleged violations of “moral rights” under the German and French copyright statutes.  
5 The nature and scope of Plaintiff’s copyright interest is governed by the U.S.  
6 Copyright Act, which does not recognize moral rights in musical compositions, and  
7 not by the laws of Germany or France. Moreover, even if Plaintiff could plead  
8 viable claims under the German or French copyright statutes, those claims would  
9 properly be litigated in the courts of those nations, and not in this Court.

10 Accordingly, the Court should grant this motion and dismiss Plaintiff’s first,  
11 third, fourth, and fifth claims for relief.

## 12 **II. BACKGROUND**<sup>1</sup>

13 Plaintiff created the Composition that is the subject of this action in or about  
14 2004. FAC ¶ 18. Plaintiff thereafter assigned legal ownership of the Composition  
15 to ABACO, a commercial music library, but retained a beneficial interest in the  
16 copyright. *Id.* ¶ 19. In 2006, ABACO registered the copyright in the Composition.  
17 *Id.* ¶ 21.

18 In or about 2013, Defendants “produced and distributed the [Film] in the  
19 United States and throughout the world.” *Id.* ¶ 23. Hans Zimmer is credited with  
20 composing the score for the Film, including the main theme, music for the closing  
21 credits, and 11 other musical cues. *Id.* ¶¶ 24-25. Plaintiff alleges that the Film’s  
22 score infringes the copyright in the Composition. *Id.*

## 23 **III. LEGAL STANDARD**

24 To survive a motion to dismiss for failure to state a claim, a complaint must  
25 set forth “more than labels and conclusions, and a formulaic recitation of the

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26 <sup>1</sup> For purposes of this motion only, Defendants accept as true the factual  
27 allegations in the First Amended Complaint. *See Sprewell v. Golden State*  
28 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It must contain factual allegations sufficient to “state a claim to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Although a court must accept the allegations of the complaint as true and construe them in the light most favorable to the plaintiff, it need not accept as true legal conclusions “cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

#### IV. ARGUMENT

##### A. Plaintiff’s First Claim For Relief, For Alleged Copyright Infringement, Does Not Satisfy Rule 8

In his first claim for relief, Plaintiff charges nine of the ten Defendants with alleged infringement of the copyright in the Composition under the Copyright Act, 17 U.S.C. § 501, *et seq.* Plaintiff does not identify the specific infringing conduct allegedly undertaken by each individual Defendant, and he instead lumps all Defendants together under a blanket allegation that “Defendants produced and distributed the motion picture *12YAS* in the United States and throughout the world.” FAC ¶ 23. That is not sufficient to state a claim.

It is well established that “[a] plaintiff suing multiple defendants ‘must allege the basis of his claim against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2). . . .’” *Flores v. EMC Mortg. Co.*, 997 F. Supp. 2d 1088, 1103 (E.D. Cal. 2014) (quoting *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988)). “Specific identification of the parties to the activities alleged by the plaintiff[] is required . . . to enable the defendant to plead intelligently.” *Id.* (internal quotation marks omitted); *see In re Providian Fin. Corp. ERISA Litig.*, 2002 WL 31785044, at \*4 (N.D. Cal. Nov. 14, 2002) (holding Rule 8 not satisfied where



1 plaintiff “lumped” defendants together and failed to allege how each allegedly  
 2 breached its duties to plaintiff). In a copyright case, this requires that the plaintiff  
 3 identify the specific conduct by each individual defendant that constitutes alleged  
 4 infringement. *See Eberhard Architects, LLC v. Bogart Architecture, Inc.*, 2014 WL  
 5 4354561, at \*3 (N.D. Ohio Aug. 29, 2014) (holding that plaintiff had not stated a  
 6 claim under *Iqbal* and *Twombly* where it “lump[ed] all defendants together” and  
 7 “generically claim[ed]” that each infringed its copyright). Plaintiff has not done so  
 8 here.

9 Plaintiff’s blanket allegation that “Defendants produced and distributed the  
 10 motion picture *12YAS* in the United States and throughout the world” (FAC ¶ 23)  
 11 does not satisfy Rule 8. In the first instance, a defendant’s involvement in  
 12 production of a motion picture, without more, does not render the defendant liable  
 13 for copyright infringement based upon allegedly infringing material included in the  
 14 film’s score. Rather, Plaintiff must plead and prove that each Defendant exercised  
 15 one of the exclusive rights reserved to him under 17 U.S.C. § 106. Moreover, while  
 16 distribution is one of the exclusive rights reserved to the copyright owner under  
 17 section 106, the Copyright Act reaches only acts of infringement occurring within  
 18 the United States. *See Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088,  
 19 1098 (9th Cir. 1994) (Copyright Act has no extraterritorial application). Therefore,  
 20 just as Plaintiff cannot state an infringement claim against persons who merely  
 21 produced the Film, he cannot state a claim against persons who distributed the Film  
 22 only outside the United States. *Id.*; *see Roberts v. Keith*, 2009 WL 3572962, at \*4  
 23 (S.D.N.Y. Oct. 23, 2009) (copyright claim did not satisfy *Iqbal* where it lumped  
 24 together defendants and did not specifically alleged which defendants “engaged in  
 25 domestic infringing activity”).

26 Because Plaintiff lumps together all Defendants and fails to identify which  
 27 ones allegedly distributed the Film in the United States or otherwise engaged in  
 28



1 actionable infringement under the Copyright Act, Plaintiff has not adequately pled  
2 his first claim for relief.

3 **B. Plaintiff's Third Claim For Relief, For Alleged Violation Of The**  
4 **Lanham Act, Is Precluded By *Dastar***

5 Plaintiff's third claim for relief, for alleged violation of section 43(a) of the  
6 Lanham Act, 15 U.S.C. § 1125(a), is based on his contention that Defendants, "in  
7 their advertisements and promotional materials [for *I2YAS*], have falsely credited"  
8 Hans Zimmer as the composer of the Film's score. FAC ¶ 36. Specifically,  
9 Plaintiff alleges that "[t]he applicable misrepresentation in Defendants' advertising  
10 and promotional materials reads: 'MUSIC BY HANS ZIMMER' rather than  
11 'MUSIC BY RICHARD FRIEDMAN.'" *Id.*

12 This claim is foreclosed by the Supreme Court's decision in *Dastar, supra*. In  
13 *Dastar*, the Supreme Court addressed whether the term "origin" in section 43(a) of  
14 the Lanham Act could be read to refer to the *author* of a work, such as a novel,  
15 rather than to the producer of the physical good. The Court recognized that "[t]he  
16 purchaser of a novel is interested not merely, if at all, in the identity of the producer  
17 of the physical tome (the publisher), but also, and indeed primarily, in the identity of  
18 the creator of the story it conveys (the author)." *Id.* at 33. The Court refused,  
19 however, to accord "special treatment" to "communicative products"—that is, to  
20 read the word "origin" in the Lanham Act to cover the authors of communicative  
21 products—on the ground that such treatment would "cause[] the Lanham Act to  
22 conflict with the law of copyright, which addresses that subject specifically." *Id.*  
23 Accordingly, the Court held that that phrase "origin" in section 43(a) "refers to the  
24 producer of the tangible goods that are offered for sale, and not to the author of any  
25 idea, concept, or communication embodied in those goods." *Id.* at 37.

26 Plaintiffs in a number of subsequent cases have attempted to avoid *Dastar* by  
27 framing their claims as false advertising under section 43(a)(1)(B), which refers not  
28 to the "origin" of goods but instead the "nature, characteristics, [or] qualities" of the

goods. Courts have rejected these attempts to invoke the Lanham Act’s prohibition on false advertising as an end run around the copyright laws. *See, e.g., Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009) (“[A]uthorship ... is not a nature, characteristic, or quality, as those terms are used in Section 43(a)(1)(B) of the Lanham Act.”); *Agence France Presse v. Morel*, 769 F. Supp. 2d 295, 307-08 (S.D.N.Y. 2011) (*Dastar* forecloses § 43(a)(1)(B) false advertising claim based on alleged misrepresentation of authorship); *Antidote Int’l Films, Inc. v. Bloomsbury Publ’g, PLC*, 467 F. Supp. 2d 394, 400 (S.D.N.Y. 2006) (“[T]he holding in *Dastar* that the word ‘origin’ in § 43(a)(1)(A) refers to producers, rather than authors, necessarily implies that the words ‘nature, characteristics, [and] qualities’ in § 43(a)(1)(B) cannot be read to refer to authorship.”). Thus, regardless of whether Plaintiff frames his claim that Defendants have misidentified the author of the Film’s score as one for false designation of origin or instead as one for false advertising, the claim simply is not cognizable under the Lanham Act.

In addition, Plaintiff’s Lanham Act claim suffers from the same pleading defect as his copyright claim, in that Plaintiff lumps Defendants together and fails to identify which Defendant(s) allegedly issued the advertisements and promotional materials upon which the claim is based. Because Plaintiff’s Lanham Act claim would fail as a matter of law even if that additional specificity were provided, however, Plaintiff should not be granted leave to replead his third claim for relief. *See Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988) (affirming dismissal without leave to amend where amendment would have been futile).

**C. Plaintiff Has Not Adequately Pled His Fourth And Fifth Claims For Relief, For Alleged Violations Of Moral Rights**

Plaintiff’s fourth and fifth claims for relief are for alleged violations of so-called “moral rights” under Germany’s Copyright Statute of 1965 and France’s Code of Intellectual Property of 1992. FAC ¶¶ 43-48. Plaintiff has neither pled

1 facts sufficient to state those claims for relief nor established a basis for litigating  
2 such claims, even if adequately pled, in this Court.

3 The law of the country of origin determines the nature of the rights held by  
4 the author of a copyrighted work. *See Itar-Tass Russian News Agency v. Russian*  
5 *Kurier, Inc.*, 153 F.3d 82, 90-92 (2d Cir. 1998) (holding that Russian law governs  
6 nature and ownership of rights in works created by Russian nationals and first  
7 published in Russia); *Fahmy v. Jay-Z*, 788 F. Supp. 2d 1072, 1077-83 (C.D. Cal.  
8 2011) (applying Egyptian law to determine existence and scope of moral rights  
9 where composition was created by an Egyptian national and first published in  
10 Egypt). Because the Composition appears to have been created and first published  
11 in the United States, Plaintiff's rights (if any) are limited to the exclusive rights set  
12 forth in the U.S. Copyright Act. The U.S. Copyright Act does not recognize any  
13 moral rights in connection with musical compositions. 17 U.S.C. § 106A; *see*  
14 *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 298 (7th Cir. 2011) (moral rights under  
15 Copyright Act limited to paintings, drawings, prints, sculptures, and photographs  
16 created for exhibition in a single copy or limited edition of 200 or less). Plaintiff  
17 therefore has no moral rights to enforce.

18 Moreover, Plaintiff has not identified any activities occurring within either  
19 Germany or France that would be capable of infringing Plaintiff's rights, however  
20 broadly they may be defined. The First Amended Complaint alleges that the Film  
21 and its soundtrack have been distributed in "numerous foreign nations" and "many  
22 countries of the world." FAC ¶¶ 25, 29. Plaintiff does not specifically allege,  
23 however, that either the Film or its soundtrack was distributed in Germany or  
24 France, much less identify which Defendant(s) allegedly distributed the Film in  
25 those or any other foreign territories. Plaintiff cannot rely on sweeping allegations  
26 of international distribution to invoke the copyright laws of Germany, France, or any  
27 other nation.

1 Finally, even if Plaintiff could state a claim under the copyright laws of  
 2 Germany or France, those claims would properly be litigated not in federal district  
 3 court, but instead in the courts of those nations. *See ITSI T.V. Prods., Inc. v. Cal.*  
 4 *Auth. of Racing Fairs*, 785 F. Supp. 854, 866 (E.D. Cal. 1992) (“American courts  
 5 should be reluctant to enter the bramble bush of ascertaining and applying foreign  
 6 law without an urgent reason to do so.”), *aff’d in part, rev’d in part on other*  
 7 *grounds*, 3 F.3d 1289 (9th Cir. 1993). Plaintiff has not pleaded even a jurisdictional  
 8 basis, much less any urgent reason, for litigating his purported German and French  
 9 copyright claims in this Court. Those claims should be dismissed without leave to  
 10 amend.

# 11 **V. CONCLUSION**

12 For the foregoing reasons, Defendants request that the Court grant this motion  
 13 and (1) dismiss Plaintiff’s first claim for relief, for alleged copyright infringement,  
 14 with leave to amend, and (2) dismiss Plaintiff’s third, fourth, and fifth causes of  
 15 action, for alleged violations of section 43(a) of the Lanham Act and moral rights  
 16 under the copyright laws of Germany and France, without leave to amend.

17 DATED: April 9, 2015

KENDALL BRILL & KLIEGER LLP

18  
 19  
 20 By: /s/ Robert N. Klieger

21 Robert N. Klieger

22 Attorneys for Defendants Hans Zimmer,  
 23 individually and doing business as Remote  
 24 Control Songs, Twentieth Century Fox  
 25 Film Corporation, Fox Searchlight  
 26 Pictures, Inc., Fox Entertainment Group,  
 27 Inc., New Regency Productions, Inc., River  
 28 Road Entertainment, LLC, Plan B  
 Entertainment, Inc., Remote Control  
 Productions, Inc., and Sony Music  
 Entertainment

**DECLARATION OF ROBERT N. KLIEGER**

I, Robert N. Klieger, declare as follows:

1. I am an attorney at the law firm of Kendall Brill & Klieger LLP, counsel of record for Defendants Hans Zimmer, individually and doing business as Remote Control Songs, Twentieth Century Fox Film Corporation, Fox Searchlight Pictures, Inc., Fox Entertainment Group, Inc., New Regency Productions, Inc., River Road Entertainment, LLC, Plan B Entertainment, Inc., Remote Control Productions, Inc., and Sony Music Entertainment in the above-captioned action. I am a member in good standing of the State Bar of California and am admitted to practice before this Court. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. On March 26, 2015, I sent a three-page letter via email to Plaintiff's counsel, Jeffrey L. Graubart, Esq. and Maxwell M. Blecher, Esq., discussing the issues raised in the foregoing motion and requesting the scheduling of a L.R. 7-3 conference of counsel. I did not receive any response to my letter within the time required to meet and confer under L.R. 7-3.

3. On April 4, Mr. Blecher advised me that he and his colleague, Jennifer S. Elkayam, Esq., would be available to meet and confer on April 6, and we scheduled a call for that afternoon. Rather than engage in a discussion of the issues raised in my March 26 letter, however, Mr. Blecher and Ms. Elkayam informed me during the April 6 call that they would be responding in writing to my March 26 letter.

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10100 Santa Monica Blvd., Suite 1725, Los Angeles, CA 90067.

On April 10, 2015, I served the foregoing document on the interested parties in this action as follows:

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*Counsel for Plaintiff Richard Friedman*

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on April 10, 2015, at Los Angeles, California.

/s/ Robert N. Klieger  
\_\_\_\_\_  
Robert N. Klieger